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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CALDERONE ENTERPRISES CORPORATION,

Petitioner,

against

UNITED ARTISTS THEATRE CIRCUIT, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED ARTISTS THEATRE CIRCUIT, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner Calderone Enterprises Corporation respectfully prays that a Writ of Certiorari be granted to review the Judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on December 28, 1972.

Jurisdiction

The opinion of the United States District Court for the Southern District of New York has not been officially or unofficially reported and is printed in the appendix hereto at 23a.

The opinions, majority and dissenting, of the United States Court of Appeals for the Second Circuit have not been officially or unofficially reported, the majority opinion is printed in the appendix at 29a. The dissenting opinion is printed in the appendix at 38a.

On May 24, 1971, United States District Court for the Southern District of New York entered a decision and order dismissing Petitioner's Complaint for failure to state a claim upon which relief can be granted (23a).

On December 28, 1971, the Judgment of the United States Court of Appeals for the Second Circuit was entered, affirming, by a divided Court, the order of the District Court dismissing the Complaint (61a).

Jurisdiction to review by writ of Certiorari is conferred by 28 U. S. C. Section 1254(1).

Question Presented

The question presented is whether Petitioner, an owner-lessor of various motion picture theatres under a percentage lease arrangement has standing to sue its lessee and other co-conspirators under Section 4 of the Clayton Act, 15 U. S. C. Section 15, for Antitrust violations committed jointly by such lessee and other co-conspirators, resulting in substantial financial damage to Petitioner in the form of: (a) a reduction in the amount of percentage rental received by Petitioner from its lessee; and (b) a considerable lessening in the market value of the reversionary and fee interest in its theatres.

Statutory Provisions

The statutory provisions involved are Section 4 of the Clayton Act, 15 U. S. C. Section 15 which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the district in which the defendant resides or is found or has an agent, with respect to the amount in controversy, and shall

recover three-fold the damage by him sustained, and the cost of suit, including a reasonable attorney's fee."

and Rule 12 of the Federal Rules of Civil Procedure.

Statement of Jurisdiction

Inital Federal jurisdiction in this case is predicated upon the Sherman Act and the Clayton Act, 15 U. S. C. Sections 1 through 27.

Statement of Facts

The Petitioner is a New York corporation engaged in the business of owning, operating and leasing to others motion picture theatres in Nassau County (¶2).*

The Respondents, United Artists Theatre Circuit, Inc., United Artists Eastern Theatres, Inc. and Metropolitan Playhouses, Inc. are all inter-related companies with Metropolitan being ninety-nine (99%) percent owned and United Artists Eastern Theaters, Inc. being one hundred (100%) percent owned by United Artists Theater Circuit, Inc. Those three inter-related corporations will hereinafter be referred to in the aggregate as "UATC". UATC is one of the largest operators of theatres in the United States, operating as of the date of the Complaint approximately 381 theatres, including approximately 107 theatres in the New York Metropolitan area (¶¶3, 5).

The remaining Respondents, either directly or through their affiliated or subsidiary corporations, are major distributors of feature motion pictures to theatres throughout the United States (¶4).

* All "¶" references are to paragraphs of the Verified Complaint set forth at pages 1a to 17a of the Appendix. All "a" references are to pages of the Appendix.

Petitioner is the owner of the Calderone Theatre, the Rivoli Theatre and the Cove Theatre, all located in the County of Nassau, State of New York (¶¶6, 26, 35). At the time this action was commenced, Respondent Metropolitan of the UATC group was the lessee of all of these theatres, pursuant to the various written agreements described in the Complaint (¶7).

By the terms of the leases, the theatres were leased to said Respondent, Metropolitan, at a Minimum Fixed Rental per annum plus a percentage rental per annum, based upon gross receipts and concession income. A schedule of the applicable percentage rental is set forth in the Complaint (¶¶9, 27, 36).

All three of the leased theatres were (and are) first class and luxurious in every respect. The Calderone Theatre, in particular, is physically, geographically and otherwise the finest theatre with the largest potential grossing capacity of all motion picture theatres in its competitive area (¶13).

The Complaint alleges that the UATC Respondents (including, specifically, Petitioner's lessee Metropolitan) joined in, entered into and have since remained a party to a combination and conspiracy in violation of the Antitrust laws with, among others, the distributor Respondents, the purpose of which was to monopolize and control the licensing and exhibition of feature motion pictures in first neighborhood runs in the New York Metropolitan area. Pursuant to this unlawful combination and conspiracy, a system of distribution and exhibition has been set up, known popularly as the Showcase System (¶¶16, 18).

Under the Showcase System, the parties thereto have divided all motion picture theatres in the areas which such parties determined to be suitable for first neighborhood run into several groups known as "tracks". In turn, the

feature motion pictures distributed by various distributors were then divided among the various tracks (¶18).

Under Showcase, no party would compete with any other party for the license for any feature motion picture (¶18).

Under Showcase, each theatre was obligated to and, in fact, did exhibit all feature motion pictures assigned by Respondents to the theatre's particular track, irrespective of the merits of the feature motion picture as a potential box office attraction (¶19).

Such an arrangement was and is most detrimental to the better quality theatres, such as those owned by Petitioner.

Under normal, competitive conditions, these better quality theatres would, by reason thereof, be in a position to exhibit feature motion pictures having the greatest box office appeal. This, in turn, would result in higher box office receipts, since, to a substantial extent, box office receipts are a function of and bear a direct relationship to the quality of the feature motion picture playing at the theatre. In short, the better the featured attraction, the higher the gross receipts (¶14).

Under Showcase, as noted, Petitioner's theatres were deprived of the opportunity to license substantial numbers of better grade feature motion pictures. In fact—and notwithstanding the quality status of the said theatres—not only were the theatres deprived of the better motion pictures, but they were forced to exhibit large numbers of inferior box offices attractions. Absent Showcase, these inferior motion pictures would not have been exhibited at Petitioner's theatres.

Under Showcase and as a direct result thereof, the box office receipts and the concession income at Petitioner's theatres were sharply reduced which, in turn, sharply reduced the amount of percentage rental that Petitioner was entitled to receive (¶¶21, 22, 30, 31, 39, 40).

In addition, and again as a direct consequence of the Showcase System, the market value of Petitioner's fee interest in the various theatres has been sharply and substantially impaired (¶¶23, 32, 41).

Petitioner's damages, both with respect to the amount of decreased percentage rental income and with respect to the amount of the damage to Petitioner's reversionary and fee interest, are set forth with particularity in each count of the Complaint.

These are the damages, which Petitioner has suffered as a direct result of Respondents' violations of the Antitrust Laws. It is these very same damages which Petitioner seeks to recover in the present action pursuant to the authority of the Federal Antitrust laws.

Reasons for Granting of Writ

A. Conflict Between Circuits

The issue of standing to sue under the facts of this case presents a classic example of conflict between the circuits requiring resolution by this Court. Compare *Congress Building Corp. v. Loew's, Inc.*, 246 F. 2d 587 (7th Cir., 1957); *Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir., 1956); *Mulvey v. Samuel Goldwyn Productions, Inc.*, 433 F. 2nd 1073 (9th Cir., 1970) *cert. denied* 402 U. S. 923 (1971) with *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa. 1953) *Aff'd.* 211 F. 2d 403 (3rd Cir., 1954) *cert. denied* 348 U. S. 828 (1954); *Fields Productions, Inc. v. United Artists Corp.*, 432 F. 2d 1010 (2nd Cir., 1970). The existence of this sharp conflict between the circuits was explicitly recognized by the District Court ("the governing rule [in the Second Circuit] however, is not without critique. Two circuits have adopted a contrary rule" [27a]); the majority opinion in the Circuit Court (37a); and the dis-

senting opinion in the Circuit Court (see Point III thereof labeled "Other Circuit Decisions" at 55a). Since such sharp conflict exists between the circuits on such an important and basic issue of antitrust law, this Court should properly grant Certiorari and definitively resolve the same.

B. Conflict With Applicable Decisions of This Court

The decision below is also in sharp conflict with prior decisions of this Court which have uniformly held that the antitrust laws are to be given the broadest and most liberal interpretation so as to effectuate the manifested congressional purpose. See e.g. *Radiant Burners v. Peoples Gas & Light Co.*, 364 U. S. 656, 81 S. Ct. 365 (1961); *Radovich v. National Football League*, 352 U. S. 445, 77 S. Ct. 390 (1957); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 68 S. Ct. 996 (1948); *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 66 S. Ct. 574 (1946).

That the decision below is in fact in conflict with the prior decisions of this Court was impliedly recognized in the opinion rendered by the District Court (27a) and explicitly recognized in the dissenting opinion in the Circuit Court. ("Restrictions on application of the treble damage remedy seem clearly repugnant to the language and to the repeated pronouncements of the United States Supreme Court. The Supreme Court has constantly recognized that anitrust laws should be given the broadest and most liberal interpretation in order to effectuate Congressional intent. *See, e.g. Radiant Burners v. Peoples Gas & Light Co.*, 364 U. S. 656, 660 (1961); *Radovich v. National Football League*, 352 U. S. 445, 453-454 (1957); *Mandeville Island Farms, Inc. v. American Crystal Sugar*, 334 U. S. 219, 236 (1948); *Bigelow v. R.K.O. Radio Pictures*, 327 U. S. 251, 265-266 (1946). The Court has consistently rejected judicial attempts to impose additional restrictions on standing under antitrust statutes") (46a).

C. The Importance of the Federal Question Presented

The issue here presented—involving as it does basic access to the Federal Courts under a major Federal statute—is one of paramount importance that should properly be resolved at this time by this Court.

The impact of the Federal antitrust laws is keenly felt by all segments of the busines community. The right of a class of injured parties to seek redress under the mandate of the antitrust laws should no longer be left open to question or to varying results, on the same operative facts.

In the absence of specific direction by this Court, the various circuits have separately formulated different approaches, analysis and tests with respect to the standing issue. This has resulted in a situation where based on the same operative facts standing is upheld in some parts of the country while at the same time it is elsewhere denied. The problem is particularly acute in cases such as the instant one, where the circuit involved has followed the approach of adding restrictive judicial requirements to a party's right to sue, since the result is to deprive a plaintiff of even an opportunity to set forth his proof that he has been damaged by reasons of the defendant's violation of the antitrust laws.

Consideration by this Court of these restrictions on the right to sue is particularly appropriate since as was pointed out in the dissenting opinion in the Circuit Court, such restrictions "seem clearly repugnant to the language of the statute and to the repeated pronouncements of the United States Supreme Court" (46a). See also *Hoopes v. Union Oil Co. of California*, 374 F. 2d 480, 485 (9th Cir. 1967) and 65 Colum. L. Rev. 570, 587 (1964).

D. Other Considerations

The nature of the industry involved in this case—the motion picture industry—is a further compelling reason for this court to grant certiorari for the purpose of clarifying the issue here presented. Historically, the operations of the motion picture industry have been subject to careful antitrust scrutiny and the industry has been peculiarly responsive to variations in antitrust enforcement. Unless this court clarifies the standing issue here presented, the present state of law will permit parties such as the respondents herein to conduct their illegal Showcase system of distributing and exhibiting motion pictures with impunity from suit from parties such as this plaintiff in certain parts of the country whereas in other areas, where standing is found to exist, such parties will be held fully accountable for the antitrust damage consequences of their wrongful conduct.

The uncertainty and diversity of the present state of the law also operates in a most unfair and discriminatory manner with respect to owners of motion picture theatres located in areas of the United States espousing restrictive requirements on a plaintiff's right to sue. These theatre owners are not free to enter into economic relationships with third parties, on a basis deemed most beneficial economically, unless they are prepared to forfeit their remedies under the antitrust laws. This is in sharp contrast to motion picture theatre owners located in geographic areas favoring a more liberal interpretation of the standing rules. These theatre owners are able to make economic determinations and enter into business relationships such as the percentage lease arrangement here at issue without fear that, as a result, they will lose the protective umbrella afforded by the federal antitrust statutes.

Under our federal system, the mere happenstance of geography should not be permitted to lead to such diverse and contradictory results, particularly where the rights at issue are conferred exclusively by a federal statute.

Finally, the manifest unfairness of the decision below with respect to this petitioner, must be considered. The complaint alleges with great particularity (cf. *Bigelow v. R. K. O. Radio Pictures*, 327 U. S. 251 (1946)), that for the period 1964 through 1969, the petitioner suffered considerable antitrust damages aggregating in excess of $7,000,000 all directly and proximately caused by the antitrust violations of these respondents. In view of the present posture of the action, namely that answers to the complaint have not even been served by the majority of the respondents and no pre-trial whatever has been conducted by any of the parties, the propriety of dismissing the action for lack of standing without affording petitioner the opportunity to prove its damages and the causal relationship to respondents' acts seems worthy of careful consideration and review by this court.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Complaint

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. ....

JURY DEMAND

Plaintiff hereby demands a jury trial of all issues in the action.

CALDERONE ENTERPRISES CORPORATION,

Plaintiff,

against

UNITED ARTISTS THEATRE CIRCUIT, INC., METROPOLITAN PLAYHOUSES, INC., UNITED ARTISTS EASTERN THEATRES, INC., TWENTIETH CENTURY-FOX FILM CORP., NATIONAL GENERAL CORP., COLUMBIA PICTURES INDUSTRIES, INC., PARAMOUNT PICTURES CORP., METRO-GOLDWYN-MAYER, INC., UNITED ARTISTS CORPORATION, WARNER BROS.-SEVEN ARTS, INC.,

Defendants.

Plaintiff, by its attorneys, Goldstein & Schrank, and Saul Friedberg, complaining of defendants, alleges:

First Cause of Action

1. Plaintiff institutes this action to recover treble the damages it has suffered from violations by defendants of the federal anti-trust laws commonly referred to as the Sherman Act and the Clayton Act (15 U. S. C. Secs. 1-27).

2. Plaintiff is a corporation organized and existing under the laws of the State of New York with a principal place of business in the Village of Mineola, County of Nassau, State of New York. Plaintiff is the successor by statutory merger of Erone Corporation, Glen Cove School Street Corporation and Calderone Valley Stream Corporation, and formerly prior to a statutory change of name, was named Hempstead Theatre Corporation. Plaintiff, by reason of the aforementioned statutory mergers, is the owner of all assets, including causes of action, of said merged corporations. Plaintiff at all relevant times was engaged in the business of owning, operating and leasing to others motion picture theatres in said Nassau County.

3. Upon information and belief: Defendant United Artists Theatre Circuit, Inc. is a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "UATC"); defendant Metropolitan Playhouses, Inc. is a corporation organized and existing under the laws of the State of New York (hereinafter referred to as "Metropolitan"); defendant United Artists Eastern Theatres, Inc. is a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "UAET"), at all relevant times Metropolitan was 99% owned and UAET was 100% owned, and both said corporations were completely dominated and controlled by, and were agencies of said United Artists Theatre Circuit, Inc. All three defendant corporations will hereinafter be included in the designation "UATC"; UATC has a principal place of business in the Borough of Manhattan, City, County and State of New York, within this District.

4. The defendants below described are distributors, directly or through affiliated or subsidiary corporations, of motion pictures to theatres throughout the United States, and upon information and belief: a) Twentieth Century-Fox Film Corp., at all relevant times, was a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "Fox"); b) National General Corp., at all relevant times, was a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "NGC"); c) Columbia Pictures Industries, Inc., at all relevant times, was a corporation organized and existing under the laws of the State of New York (hereinafter referred to as "Columbia"); d) Paramount Pictures Corp., at all relevant times, was a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "Paramount"); e) Metro-Goldwyn-Mayer, Inc., at all relevant times, was a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "MGM"); f) United Artists Corporation, at all relevant times, was a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "United Artists"); g) Warner Bros.-Seven Arts, Inc., at all relevant times, was a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "Warner").

5. UATC at all relevant times was engaged in the business of owning, leasing and operating motion picture theatres in said Nassau County and throughout the United States. UATC is one of the largest operators of such theatres in the United States, operating approximately 381 such theatres therein, including approximately 107 such theatres in the New York Metropolitan Area.

6. Plaintiff has been and is the owner of the Calderone Theatre, a motion picture theatre in said Nassau County (hereinafter sometimes called the "Theatre").

7. On March 21, 1947, plaintiff's predecessor entered into two (2) agreements with Metropolitan, one being a lease agreement and the other a Consolidation Agreement, which were modified by agreements entered into September 1, 1959 and April 6, 1962, all four (4) of which agreements are hereinafter called the "Lease".

8. By the terms of the Lease the Theatre was leased to Metropolitan by plaintiff for a term of years ending May 7, 1971 at a Minimum Fixed Rental for each Fiscal Year (the year ending August 31) plus a Percentage Rental for each Fiscal Year determined as described in the next succeeding paragraph.

9. The Percentage Rental payable in each Fiscal Year was the following percentages of annual Gross Receipts of the Theatre:

30% of Gross Receipts from $104,800. to $112,800;

25% of Gross Receipts from $112,800. to $120,800;

40% of Gross Receipts from $120,800. to $128,800;

20% of Gross Receipts above $128,800.

Said percentages and amounts are hereinafter called the Percentage Rental Formula.

10. Gross Receipts are defined in the Lease to include all box-office receipts and all net income from concessions with certain deductions.

11. UATC has operated the Theatre under the Lease to the present day.

12. Said Calderone Theatre is the largest theatre in said Nassau County, having approximately 2400 seats. It was built and opened in 1949 and is first class and luxurious in every respect. It is well located at the heart of the concentrated population of said Nassau County. It has available for use by its patrons ample parking space conveniently situated.

13. Physically, and by reason of location and available parking spaces, said Calderone Theatre is the finest theatre and has the largest potential grossing capability of all motion picture theatres in its competitive area.

14. The size of the box-office receipts and net concession income of a motion picture theatre is determined to a substantial extent by the quality of the feature motion pictures played therein; the better the picture as a box-office attraction, the higher will be the box-office receipts and net concession income.

15. In a free market, where all feature motion pictures of all motion picture distributors would be available to all theatres for licensing under conditions of free competition, the Theatre, by reason of the considerations set forth above, would be able to license for exhibition therein the best box-office attractions of all feature motion pictures released by all motion picture distributors, and its box-office gross receipts and net concession income and the Percentage Rental payable to plaintiff would be correspondingly large.

16. In or about the end of the 1963 Fiscal Year, UATC joined in and entered into and has since remained a party

to a continuing combination and conspiracy in unreasonable restraint and monopolization of the trade and commerce among the several states in the licensing and exhibition of feature motion pictures on first neighborhood run in the New York Metropolitan Area, known as and hereinafter called the "Showcase System", and more particularly described below.

17. The parties to the Showcase System were and are the major circuits operating motion picture theatres in the New York Metropolitan Area, including UATC, Century Circuit, Inc., Loew's Theatre and Realty Co., Inc., RKO-Stanley Warner Theatres, Inc., and the distributor defendants described in paragraph 4 hereof, and other distributors and exhibitors.

18. The parties to the Showcase System agreed to and continue to agree to and thereafter did divide all theatres in said area which they deemed suitable for first neighborhood run into several groups of theatres known as "Tracks" and agreed to and thereafter from day to day did divide all feature motion pictures released by the distributors thereof among themselves for exhibition on one or another of the Tracks and agreed, and kept and maintained and operated on a day to day basis under said agreement, that no party to said agreement would compete with any other party for the license of a particular picture nor would attempt to license any such picture which had been assigned to a Track for exhibition on first neighborhood run in any of its theatres not on the assigned Track. The distributor defendants helped to initiate, acquiesced in and became and remained a part of the Showcase System.

19. As a result of its adherence to the Showcase System, UATC failed and refused to attempt to license any feature motion picture for exhibition at the Theatre which had not been assigned under said System to the Track of which the Theatre was a part and the Theatre was thereby deprived of the right and opportunity to compete for licenses to exhibit all feature motion pictures, including all of the best box office attractions, and the Theatre was obliged to and did exhibit as a result thereof large numbers of inferior box office attractions which it otherwise would not have exhibited and as a result thereof the box office receipts and concession net income of the Theatre and the Percentage Rentals payable to plaintiff fell off sharply.

20. During the Fiscal Years 1961-1963 inclusive, the Gross Receipts of the Calderone Theatre and the Percentage Rentals payable thereon by application of the Percentage Rental Formula were as follows:

Fiscal Year	*Gross Receipts*	*Percentage Rental*
1961	$ 605,524.70	$102,944.14
1962	514,768.71	84,793.74
1963	559,267.83	93,693.57
Totals	$1,679,561.24	$281,431.45
Averages	$ 559,853.74	$ 93,810.48

21. The Gross Receipts of the Theatre and the Percentage Rentals calculated thereon by application of the

Percentage Rent Formula during the six Fiscal Years 1964-1969 inclusive are as follows:

Fiscal Year	*Gross Receipts*	*Percentage Rental*
1964	$494,129.01	$80,665.80
1965	380,471.83	57,934.37
1966	413,330.73	64,506.15
1967	372,169.66	56,273.93
1968	358,726.00	53,585.20
1969	207,693.00	23,378.60

The difference between the Percentage Rentals based on the Gross Receipts actually attained and the Percentage Rentals that would have been attained at the average of 1961-1963 Gross Receipts is $226,519., constituting damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

22. Upon information and belief, from 1964 to 1968, the total box office receipts of all motion picture theatres in the United States increased by 23%. Applying an annual average rate of increase of 4.6% for such years to the Theatre, the Percentage Rentals for the Fiscal Years 1965 through 1969 would have been $33,542 greater than as set forth in paragraph 21 hereof, and such additional sum constitutes damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

23. In addition thereto, plaintiff was damaged by said violations in that the market value of the fee of the Theatre declined as a result of the decline in rentals in an

amount which plaintiff calculates to be approximately $900,000. and such additional sum constitutes damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

24. By reason of said violations, plaintiff has been directly and proximately damaged in its business and property in the total sum of $1,160,061. and is entitled, by reason of the aforementioned statutes, to recover damages from defendants in treble said amount or the total sum of $3,480,183. together with attorneys' fees, costs, disbursements and interest.

Second Cause of Action

25. Plaintiff repeats and realleges with the same force and effect as if here set forth in full the allegations contained in the paragraphs of this complaint numbered "1" to "5" inclusive, "7", "8", "10", "11", and "14" to "19" inclusive.

26. Plaintiff has been and is the owner of the Rivoli Theatre, a motion picture theatre in said Nassau County (herein sometimes called the "Theatre").

27. The Percentage Rental payable in each Fiscal Year was the following percentages of annual Gross Receipts of the Theatre:

30% of Gross Receipts from $308,800. to $324,800;

25% of Gross Receipts from $324,800. to $347,800;

40% of Gross Receipts from $347,800. to $370,800;

20% of Gross Receipts above $370,800.

Said percentages and amounts are herein called the Percentage Rental Formula.

28. Said Rivoli Theatre is a large theatre having approximately 1900 seats, first class and luxurious in every respect, well located at the heart of the concentrated population of said Nassau County, and has available for use by its patrons ample parking space conveniently situated. It is one of the finest theatres and has one of the largest potential grossing capabilities of all motion picture theatres in its competitive area.

29. During the Fiscal Years 1961-1963 inclusive, the Gross Receipts of the Rivoli Theatre and the Percentage Rentals payable thereon by application of the Percentage Rental Formula were as follows:

Fiscal Year	*Gross Receipts*	*Percentage Rental*
1961	$323,352.56	$ 6,465.77
1962	308,929.11	2,138.73
1963	351,817.30	14,256.92
Totals	$984,098.97	$22,861.42
Averages	$328,032.99	$ 7,620.47

30. The actual Gross Receipts of the Theatre and the Percentage Rentals calculated thereon by application of the Percentage Rent Formula during the six Fiscal Years 1964-1969 inclusive are as follows:

Fiscal Year	*Gross Receipts*	*Percentage Rental*
1964	$302,263.31	$138.99
1965	297,376.84	0
1966	257,921.13	0
1967	209,500.89	0
1968	223,382.00	0
1969	191,783.00	0

The difference between the Percentage Rentals based on the Gross Receipts actually attained and the Percentage Rentals that would have been attained at the average of 1961-1963 Gross Receipts is $45,584, constituting damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

31. Upon information and belief, from 1964 to 1968 the total box office receipts of all motion picture theatres in the United States increased by 23%. Applying an annual average rate of increase of 4.6% for such years to the Theatre, the Percentage Rentals for the Fiscal Years 1965 through 1969 would have been $5,257. greater than as set forth in paragraph 30 hereof, and such additional sum constitutes damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

32. In addition thereto, plaintiff was damaged by said violations in that the market value of the fee of the Theatre declined as a result of the decline in rentals in an amount which plaintiff calculates to be approximately $300,000., and such additional sum constitutes damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

33. By reason of said violations, plaintiff has been directly and proximately damaged in its business and property in the total sum of $350,841. and is entitled by reason of the aforementioned statutes, to recover damages from defendants in treble said amount, or the total sum of $1,052,523., together with attorneys' fees, costs, disbursements and interest.

Third Cause of Action

34. Plaintiff repeats and realleges with the same force and effect, as if here set forth in full, the allegations contained in the paragraphs of this complaint numbered "1" to "5" inclusive, "7", "8", "10", "11" and "14" to "19" inclusive.

35. Plaintiff has been and is the owner of the Cove Theatre, a motion picture theatre in said Nassau County (herein sometimes called the "Theatre").

36. The Percentage Rental payable in each Fiscal Year was the following percentages of annual Gross Receipts of the Theatre:

30% of Gross Receipts from $165,500. to $178,000;

25% of Gross Receipts from $178,000. to $190,500;

40% of Gross Receipts from $190,500. to $203,000;

20% of Gross Receipts above $203,000.

Said percentages and amounts are herein called the Percentage Rental Formula.

37. Said Cove Theatre, having approximately 1500 seats, is of adequate size for first run, is first class and

luxurious in every respect, is well located and readily accessible to the population of said Nassau County, and has available for use by its patrons ample parking space conveniently situated. It is one of the finest theatres and has one of the largest potential grossing capabilities of all motion picture theatres in its competitive area.

38. During the Fiscal Years 1961-1963 inclusive, the Gross Receipts of the Cove Theatre and the Percentage Rentals payable thereon by application of the Percentage Rental Formula were as follows:

Fiscal Year	*Gross Receipts*	*Percentage Rental*
1961	$ 485,212.10	$ 68,317.42
1962	404,933.56	52,261.71
1963	367,181.29	44,711.26
Totals	$1,257,326.95	$165,290.39
Averages	$ 419,108.98	$ 55,096.79

39. The actual Gross Receipts of the Theatre and the Percentage Rentals calculated thereon by application of the Percentage Rent Formula during the six Fiscal Years 1964-1969 inclusive are as follows:

Fiscal Year	*Gross Receipts*	*Percentage Rental*
1964	$284,151.28	$28,105.26
1965	203,409.21	11,956.84
1966	191,429.60	7,246.84
1967	144,641.35	0
1968	170,564.00	1,519.00
1969	174,304.00	2,651.20

The difference between the Percentage Rentals based on the Gross Receipts actually attained and the Percentage Rentals that would have been attained at the average of 1961-1963 Gross Receipts is $279,102., constituting damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

40. Upon information and belief, from 1964 to 1968 the total box office receipts of all motion picture theatres in the United States increased by 23%. Applying an annual average rate of increase of 4.6% for such years to the Theatre, the Percentage Rentals for the Fiscal Years 1965 through 1969 would have been $35,811. greater than as set forth in paragraph 39 hereof, and such additional sum constitutes damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

41. In addition thereto, plaintiff was damaged by said violations in that the market value of the fee of the Theatre declined as a result of the decline in the rentals in an amount which plaintiff calculates to be approximately $525,000, and such additional sum constitutes damage to plaintiff's business and property directly and proximately resulting from defendants' aforementioned violations of the anti-trust laws.

42. By reason of said violations, plaintiff has been directly and proximately damaged in its business and property in the total sum of $839,913. and is entitled, by reason of the aforementioned statutes, to recover damages from defendants in treble said amount, or the total sum of $2,519,739, together with attorneys' fees, costs, disbursements and interest.

Fourth Cause of Action

43. The jurisdiction of this Court over this cause of action is established by the principles of pendent jurisdiction.

44. Plaintiff repeats and realleges with the same force and effect as if here set forth in full the allegations contained in the paragraphs of this complaint numbered "2" to "23" inclusive.

45. By reason of the Lease, defendants UATC, Metropolitan and UAET owed the legal duty to plaintiff to refrain from any affirmative or willful wrongful acts which would have the effect of reducing Gross Receipts and Percentage Rentals of the Theatre. In violation of said duty, said defendants committed the affirmative and willful wrongful acts herein described.

46. By reason thereof, plaintiff has been directly and proximately damaged in its business and property in the total sum of $1,160,061. and is entitled to recover damages from said defendants in said amount together with costs, disbursements and interest.

Fifth Cause of Action

47. Plaintiff repeats and realleges with the same force and effect, as if here set forth in full the allegations contained in the paragraphs of this complaint numbered "43", "25" to "32" inclusive, and "45".

48. By reason thereof, plaintiff has been directly and proximately damaged in its business and property in the total sum of $350,841. and is entitled to recover damages

from said defendants in said amount together with costs, disbursements and interest.

Sixth Cause of Action

49. Plaintiff repeats and realleges with the same force and effect as if here set forth in full the allegations contained in the paragraphs of this complaint numbered "43", "34" to "41" inclusive, and "45".

50. By reason thereof, plaintiff has been directly and proximately damaged in its business and property in the total sum of $839,913. and is entitled to recover damages from said defendants in said amount together with costs, disbursements and interest.

WHEREFORE, plaintiff demands judgment:

A. On the First Cause of Action against all defendants, in the sum of $3,480,183, representing treble damages sustained by plaintiff;

B. On the Second Cause of Action against all defendants, in the sum of $1,052,523, representing treble damages sustained by plaintiff;

C. On the Third Cause of Action against all defendants, in the sum of $2,519,739, representing treble damages sustained by plaintiff;

D. On the Fourth Cause of Action against the defendants United Artists Theatre Circuit, Inc., Metropolitan Playhouses, Inc., and United Artists Eastern Theatres, Inc., in the sum of $1,160,061, representing damages sustained by plaintiff;

Complaint

E. On the Fifth Cause of Action against the defendants United Artists Theatre Circuit, Inc., Metropolitan Playhouses, Inc. and United Eastern Theatres, Inc., in the sum of $350,841, representing damages sustained by plaintiff;

F. On the Sixth Cause of Action against the defendants United Artists Theatre Circuit, Inc., Metropolitan Playhouses, Inc. and United Artists Eastern Theatres, Inc., in the sum of $839,913, representing damages sustained by plaintiff;

G. On the First, Second and Third Causes of Action perpetually enjoining and restraining all defendants from continuation of their unlawful acts and practices herein alleged;

H. Awarding to plaintiff attorneys' fees, costs, disbursements and interest as provided by law;

I. Granting plaintiff such other, further and different relief as the nature of the case may require, and as to this Court may seem just and proper.

GOLDSTEIN & SCHRANK

By /s/ HERBERT SCHRANK
Attorneys for Plaintiff
Office & P. O. Address
122 East 42nd Street
New York, N. Y. 10017
YUkon 6-3036

/s/ .....
SAUL FRIEDBERG
Attorney for Plaintiff
Office & Post Office Address
136 East 56th Street
New York, N. Y. 10022
838-4949

Notice of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein the undersigned defendants shall move this Court at a Motion Part thereof, Room 506 of the United States Courthouse, Foley Square, New York, New York, on the 2nd day of February, 1971 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the first three counts of the complaint herein on the ground that they fail to state a claim upon which relief can be granted to this plaintiff and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
January 21, 1971

Yours, etc.,

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON

By GEORGE BERGER
A Member of the Firm
Attorneys for Defendant
United Artists Corporation
477 Madison Avenue
New York, New York 10022
758-6700

Notice of Motion

SCHWARTZ, MERMELSTEIN, BURNS, LESSER & JACOBY

By (Illegible)
A Member of the Firm
Attorneys for Defendant
Columbia Pictures Industries, Inc.
19 East 70th Street
New York, N. Y. 10021
RE 4-5930

STROOCK & STROOCK & LAVAN

By (Illegible)
A Member of the Firm
Attorneys for Defendant
Warner Bros. Inc., sued herein as
Warner Bros.-Seven Arts, Inc.
61 Broadway
New York, N. Y. 10006
425-5200

ROYALL, KOEGEL & WELLS

By (Illegible)
A Member of the Firm
Attorneys for Defendant
Twentieth Century-Fox Film
Corporation
200 Park Avenue
New York, N. Y. 10017
972-7000

Notice of Motion

BOOTH, LIPTON & LIPTON

By (Illegible)
A Member of the Firm
Attorneys for Defendant
National General Pictures
Corporation
292 Madison Avenue
New York, N. Y. 10017
686-0644

E. COMPTON TIMBERLAKE

By E. COMPTON TIMBERLAKE
Attorney for Defendant
Paramount Pictures Corp.
One Gulf & Western Plaza
New York, N. Y. 10023
333-4908

DAVIS POLK & WARDWELL

By HENRY KING
A Member of the Firm
Attorneys for Defendant
Metro-Goldwyn-Mayer, Inc.
One Chase Manhattan Plaza
New York, N. Y.
HA 2-3400

Notice of Motion

To:

GOLDSTEIN & SCHRANK
Attorneys for Plaintiff
122 East 42nd Street
New York, N. Y. 10017
YUkon 6-3036

WACHTELL, LIPTON, ROSEN & KATZ,
Attorneys for United Artists Theatre Circuit, Inc.
Metropolitan Playhouses, Inc.,
United Artists Eastern Theatres, Inc.
230 Park Avenue
New York, N. Y. 10017
889-4300

Notice of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that upon the annexed affidavit of Bernard W. Nussbaum, sworn to on the 22nd day of January, 1971, and upon the complaint and all of the papers and proceedings heretofore had herein, the undersigned will move this Court, at a Motion Part in Room 506, United States Courthouse, Foley Square, New York, New York, on the 2nd day of February, 1971, at 10:00 o'clock in the forenoon of that day or as soon thereafter as coun-

sel can be heard, for an order pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint herein on the grounds that Counts One through Three, upon which the jurisdiction of this Court is based, do not state a claim upon which relief can be granted and that, as a consequence, Counts Four through Six, based on pendente jurisdiction, must be dismissed along with Counts One through Three, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 22, 1971

WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Defendants
United Artists Theatre Circuit, Inc., Metropolitan Playhouses, Inc. and United Artists Eastern Theatres, Inc.

By (Illegible)
A Member of the Firm
Office & P. O. Address
230 Park Avenue
New York, New York 10017
Tel. No. 889-4300

To:

GOLDSTEIN & SCHWANK
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017

cc: Attorneys for All Defendants

Memorandum of United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1539

CALDERONE ENTERPRISES CORPORATION,

Plaintiff,

against

UNITED ARTISTS THEATRE CIRCUIT, INC., et al.,

Defendants.

IRVING BEN COOPER, D. J.

Defendants move pursuant to Rule 12(b)(6), F. R. Civ. P. to dismiss Counts I, II and III of the complaint for failure to state a claim upon which relief can be granted. Additionally, defendants United Artists Theatre Circuit, Inc., Metropolitan Playhouse, Inc. and United Artists Eastern Theatres, Inc. (collectively "UATC") move pursuant to Rule 12(b)(1), F. R. Civ. P. to dismiss for want of jurisdiction as to counts IV, V and VI. Motions granted.

Plaintiff alleges the following facts: Plaintiff owned and owns the Calderone, Rivoli and Cove theatres in Nassau County, New York (¶6, 26, 35).[1] Plaintiff's predecessor in interest had leased the aforementioned theatres to UATC, film exhibitors, in 1947 for an annual fixed rental with additional rental, if any, to be based on a stated

[1] Numbers pertain to paragraphs in the complaint.

schedule of percentages of annual gross receipts for each of these theatres (¶¶3, 7, 8, 9, 25, 27, 34, 36). UATC operated each of these theatres under lease agreements through April 16, 1970, the date upon which this action was commenced (¶¶11, 25, 34). Plaintiff makes no allegation that it reserved any right to participate in the operations or management of these theatres.

Plaintiff alleges that at or about the end of the 1963 fiscal year an exhibition and distribution system ("Showcase") was established between UATC, the remaining defendants who are distributors of films, and other motion picture exhibitors to divide motion picture theatres in an area into groups ("tracks"). (¶¶16-18, 25, 34). Under Showcase, it is argued, no party could compete with any other party for the license of any feature motion picture; that each theatre was obligated to and did exhibit all feature motion pictures assigned irrespective of the merits of the feature motion picture as a potential box office attraction. Plaintiff contends that it suffered injury in the form of lower rentals and impairment of the value of its fee and reversionary interests due to the fact that its better quality theatres which would ordinarily be able to most profitably book features having the greatest box office appeal, were not only precluded from competing for these films but were forced to accept lesser quality items. Plaintiff urges this resultant injury, amounting to millions of dollars of damage, was in violation of the anti-trust laws, 15 U. S. C. §1-27. (¶¶1, 13-15, 18, 19, 21-24, 30-33, 39-42).

Section 4 of the Clayton Act, 15 U. S. C. §15, provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden

> by the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

Our Circuit has held this language applicable only to "direct" injuries. Accordingly, a non-operating motion picture theatre landlord has no standing to maintain a Clayton Act treble damage action based upon antitrust violations which are alleged to have adversely affected its percentage rental with alleged resulting damage to its fee and reversionary interest. Any injury thereby is incidental and not direct or within the target area of unlawful activity which would be comprised of other lessees in this case. *Field Productions, Inc.* v. *United Artists Corp.*, 318 F. Supp. 87 (S. D. N. Y. 1969), *affirmed* 432 F. 2d 1010 (2d Cir. 1970); *Billy Baxter, Inc.* v. *Coca-Cola Company*, 431 F. 2d 183 (2d Cir. 1970); *SCM Corp.* v. *Radio Corporation of America*, 407 F. 2d 166 (2d Cir.), *cert. denied*, 395 U. S. 943 (1969); *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F. 2d 292 (2d Cir. 1958); *Productive Inventions* v. *Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956).

In *Productive Inventions, supra*, our Circuit stated:

> "Shareholders and officers of corporations as well as creditors and landlords have been held not to have standing to sue for treble damages. [Citations omitted.] Undoubtedly, such persons suffer some financial loss when anti-trust violations are directed against the corporations in which they have an interest. But not every financial loss due to an anti-trust violation, however remote, gives a right of action."

Memorandum

"The situation here presented is akin to the cases cited above, and we think falls squarely within the rule denying relief for incidental damages. In *Harrison* v. *Paramount Pictures, Inc.*, D. C. 115 F. Supp. 312, *affirmed*, 3 Cir. 211 F. 2d 405, the owner of a theatre had leased it under a guaranteed rental plus a percentage of the profits derived from its operation. The owner brought a treble damage suit claiming diminution in rental because of defendants' conspiracy to deny profitable pictures to the theatre. Judge Kirkpatrick, in a reasoned opinion that was accepted by the Third Circuit, ruled that the owner had no 'right' to increased rentals by the showing of first-run pictures but only a 'hope' that such pictures would increase the theatre's income. Thus, any financial loss suffered by the plaintiff was only incidental to the acts complained of. Here, too, the appellant has no standing under the anti-trust laws to complain of the incidental loss of royalties by activities of Trico, not directed at it."[2] 224 F. 2d at 679-80.[3] Cf. *Melrose Realty Co. Inc.* v. *Loew's Inc.*, 234 F. 2d 518 (3rd Cir.) *cert. denied* 352 U. S. 890 (1956); *Lieberthal* v. *North County Lanes, Inc.*, 221 F. Supp. 685 (S. D. N. Y. 1963), *affirmed on alternative grounds*, 332 F. 2d 269 (2d Cir. 1964); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 (S. D. N. Y. 1961).[3]

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[2] This is irrespective of whether the defendant-tenants were participants in the alleged conspiracy. *Lieberthal, infra*, at 690.

[3] *Contra Erone Corp.* v. *Skouras Theatres Corp.*, 166 F. Supp. 621 (S. D. N. Y. 1957); *Camrel Co., Inc.* v. *Paramount Film Distributing Corp. et al.*, C. C. H. Trade C. A. S. ¶57, 233 (S. D. N. Y. 1944). *Camrel* preceded *Productive Inventions, supra*, and the *Erone* result has not been followed in our Circuit or District.

The governing rule, however, is not without critique. Two Circuits have adopted a contrary rule. *Congress Building Corp.* v. *Loew's, Inc.*, 246 F. 2d 587 (7th Cir. 1957); *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956). The anti-trust laws are generally to be given the broadest and most liberal interpretation to achieve their remedial purposes. *Perma Life Mufflers* v. *International Parts*, 392 U. S. 134, 139 (1968); *Minnesota Mining* v. *New Jersey Wood F. Co.*, 381 U. S. 311, 318 (1965); *Radiant Burners* v. *People's Gas & Light Co.*, 364 U. S. 656 (1961); *Radovich* v. *National Football League*, 352 U. S. 445, 453-54 (1957); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar*, 334 U. S. 219, 236 (1948); 64 Colum. L. Rev. 570, 585, 587 (1964). We note additionally that no actual "target" private plaintiffs (such as lessees here) may have enough time, financial resources, clear probability of success, and sufficient damages to warrant litgation to vindicate the policies of the anti-trust laws—even though a more "remote" and willing plaintiff (such as the lessor here) may exist. However, *Productive Inventions*, *supra*, and *Harrison*, *supra*, do not permit such propositions to control.

As we dismiss the federal claim, we also dismiss the pendent state claim. *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 726 (1966); *O'Neill* v. *Maytag*, 339 F. 2d 764, 766 n. 3 (2d Cir. 1964).

So Ordered:

New York, N. Y.
May 24, 1971

IRVING BEN COOPER
United States District Judge

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 70 Civ. 1539

CALDERONE ENTERPRISES CORPORATION,

Plaintiff,

against

UNITED ARTISTS THEATRE CIRCUIT, INC., et al.,

Defendants.

NOTICE IS HEREBY GIVEN that Calderone Enterprises Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and order dated May 24, 1971 and entered in this action on May 24, 1971 dismissing plaintiff's complaint.

Dated: New York, N. Y.
June 21, 1971

GOLDSTEIN & SCHRANK

By /s/ DAVID BERNFELD
a Member of the Firm
Attorneys for Plaintiff
Office and P. O. Address
99 Park Avenue
New York, N. Y. 10016
986-3036

Opinions of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 293—September Term, 1971.

(Argued November 11, 1971 Decided December 28, 1971.)

Docket No. 71-1713

CALDERONE ENTERPRISES CORPORATION,

Plaintiff-Appellant,

—against—

UNITED ARTISTS THEATRE CIRCUIT, INC., METROPOLITAN PLAYHOUSES, INC., UNITED ARTISTS EASTERN THEATRES, INC., TWENTIETH CENTURY-FOX FILM CORP., NATIONAL GENERAL CORP., COLUMBIA PICTURES INDUSTRIES, INC., PARAMOUNT PICTURES CORP., METRO-GOLDWYN-MAYER, INC., UNITED ARTISTS CORPORATION, WARNER BROS. SEVEN ARTS, INC.,

Defendants-Appellees.

Before:

KAUFMAN and MANSFIELD, *Circuit Judges,*
and LEVET, *District Judge.**

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* Of the United States District Court, for the Southern District of New York, sitting by designation.

Opinion of Court

MANSFIELD, *Circuit Judge*:

This appeal raises once again the question whether one who is not a "target" of an alleged antitrust conspiracy has standing under §4 of the Clayton Act, 15 U.S.C. §15, to sue for treble the amount of damages suffered by it incidentally. In this case, suit is brought by a non-operating landlord of theatres allegedly used by its tenant and various motion picture distributors and exhibitors in furtherance of an antitrust conspiracy to restrain the trade of competing distributors and exhibitors. We adhere to our prior decisions on the issue, see *Fields Productions, Inc. v. United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *affirming*, 318 F. Supp. 87 (S.D.N.Y. 1969), *cert. denied*, 401 U.S. 949 (1971); *Billy Baxter, Inc. v. Coca-Cola Company*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, *rehearing denied*, 401 U.S. 1014 (1971); *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943, *rehearing denied*, 396 U.S. 869 (1969); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956), and affirm the district court's dismissal of the complaint.

The action arises out of plaintiff's lease of three theatres located in Nassau County, New York (the Calderone, Rivoli and Cove) to defendant Metropolitan Playhouses, Inc., which, along with defendant United Artists Eastern Theatres, Inc., is a subsidiary of defendant United Artists Theatre Circuit, Inc. (all three of which are referred to collectively as UATC), for operation as motion picture theatres by UATC. The remaining defendants are engaged in the distribution of motion pictures to theatres throughout the United States, including those operated by UATC.

Invoking federal jurisdiction pursuant to the federal antitrust laws, plaintiff on April 16, 1970, filed its complaint containing six claims, the first three of which seek

more than $7 million treble damages from all defendants, based upon their participation in an alleged antitrust conspiracy to restrain trade in the distribution and exhibition of motion pictures. The last three claims, predicated on pendent jurisdiction, seek $2,350,815 damages against UATC for breach of its lease of the three theatres. Each of the first three claims of the complaint alleges that plaintiff's predecessor leased one of the three theatres (the Calderone, Rivoli, or Cove), a high quality, first-class house, to UATC for an annual fixed minimum rental, plus an aditional rental based upon a percentage of gross receipts realized annually from exhibition of motion pictures, the term of the lease being later extended to May 7, 1971. Plaintiff, as the landlord of the three theatres, did not reserve any right to participate in the operations or management of them. It alleges that the defendant-distributors, pursuant to a conspiracy with UATC and other motion picture theatre operators in violation of the federal antitrust laws, established a system of distributing motion pictures in the New York Metropolitan area called "Showcase." Under "Showcase" UATC and other exhibitors did not compete against one another for licenses from distributors to exhibit motion pictures on a first neighborhood run basis. Instead they divided all theatres suitable for such runs into groups known as "tracks" and allocated motion pictures for first neighborhood runs among the different "tracks." In the absence of such an arrangement, plaintiff alleges, better quality theatres such as the three leased by plaintiff to UATC would on a competitive basis exhibit pictures having the greatest box office appeal, thus realizing higher gross receipts than from less popular pictures. Under "Showcase," however, it is alleged that each of the three theatres was obligated to exhibit all features assigned to that theatre's "track," including inferior pictures that would not have been exhibited under normal

competitive conditions, with the result that plaintiff's percentage of rental income was substantially less than it otherwise would have been and the market value of its fee interest in the theatres has been impaired. Plaintiff seeks treble the amount of the alleged loss in income and in value of the theatres.

The last three claims of the complaint seek single damages against the UATC defendants based on the charge that their exhibition of pictures in the three theatres pursuant to "Showcase" constituted a breach of their duty under the leases to refrain from willful acts which would have the effect of reducing gross receipts and percentage rentals of the three theatres.

The district court granted defendants' motion, pursuant to Rule 12(b)(6), F.R.C.P., to dismiss the first three counts on the ground that as a non-operating landlord of a motion picture theatre, plaintiff did not have standing under §4 of the Clayton Act to recover damages allegedly caused by a combination of motion picture distributors and theatre operators to restrain trade in the exhibition of motion pictures, in violation of the federal antitrust laws. Accordingly the three pendent state claims were also dismissed pursuant to the teaching of *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966); see also *O'Neill* v. *Maytag*, 339 F.2d 764, 766 n.3 (2d Cir. 1964).

In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have "standing" to sue for treble damages under §4 of the Clayton Act, a person must be within the "target area" of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage

by virtue of their relationship with "targets" or with participants in an alleged antitrust conspiracy, rather than by being "targets" themselves. For example, standing has been denied to a patent owner claiming derivative harm as the result of a conspiracy directed against its licensees, *Productive Inventions* v. *Trico Products Corp., supra; SCM Corp.* v. *Radio Corp. of America, supra*, a franchisor complaining of an antitrust combination directed at its franchisee, *Billy Baxter, Inc.* v. *Coca-Cola Company, supra*, and a motion picture producer seeking damages from its television distributor based upon the latter's distribution of films by "block booking" the films with a view to restraining the trade of television stations and other distributors but not producers, *Field Productions, Inc.* v. *United Artists Corp., supra*.

The rationale behind the foregoing demarcation is simple, fair and reasonable. It respects the purpose of §4 of the Clayton Act, which is to provide a private enforcement weapon that will deter violation of the federal antitrust laws by permitting any person injured in his business by reason of an antitrust violation to recover treble the damages actually suffered. It acknowledges that while many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. Furthermore if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress. If the antitrust laws were precise

and crystalized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few "bright lines" in the area, even experts who have devoted their entire professional lives to the practice of antitrust law often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds.[1]

Accordingly it is necessary to use a rule of reason in construing the requirements of §4 of the Clayton Act as to standing, just as such a rule has been adopted by courts in determining whether restraints, other than *per se* violations, transgress §§1 and 2 of the Sherman Act. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4-5 (1958); *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). A line which limits standing to those against whom the antitrust violation is directed fulfills Congress' fundamental purpose and at the same time establishes a reasonable and easily identifiable cut-off that avoids the unfortunate consequences of opening the floodgate to all, no matter how remote their interest or incidental their relationship.[2] Competitors who are within the

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[1] See Austern, *Dealing With Uncertainties* in *How to Comply With the Antitrust Laws* 367-68 (Van Cise & Dunn, eds. 1954) ("By this time, perhaps, an abiding sympathy may have been enlisted for those lawyers who must advise in this field. Even the most uncharitable should commiserate with the businessman who seeks to obtain definitive working rules for his daily operations.")

[2] Despite our dissenting brother's suggestion that the "target area" standard is vague and confusing, we find it to possess the virtue of definiteness. In simple terms a "target" is a person or business against which competitive aim is taken. The line is clearly drawn by requiring that to have standing one must be an object of an antitrust conspiracy. In contrast, the "foreseeability" test urged by the dissent would permit anyone to sue, regardless of how distant his interest or relationship (including a customer of a competitor's customer, or a supplier to a supplier dealing with an alleged conspirator), since it would be difficult to disprove the fact that remote economic repercussions in the line of distribution result from almost every antitrust violation.

target area of an alleged antitrust conspiracy usually have more incentive than others to avail themselves of §4. In those cases where they fail to do so, the Government may, of course, seek injunctive or punitive relief under other sections of the antitrust laws. See, *e.g.*, 15 U.S.C. §§1, 2, 4, 9.

Applying these established principles here, plaintiff, a non-operating landlord of a theatre leased to an exhibitor, is clearly outside of the target area of the alleged conspiracy of distributors and exhibitors, which was to restrain competition in the exhibition of motion pictures. The alleged conspiracy was admittedly not aimed at plaintiff, but at competing distributors and exhibitors.[3] Nor does the fact that the plaintiff's lessee was allegedly a party to the conspiracy materially distinguish this case from those where standing has been denied to one having a similar relationship to an innocent competitor victimized by a conspiracy, *e.g.*, *Billy Baxter, Inc.* v. *Coca-Cola Company, supra*; *SCM Corp.* v. *Radio Corp. of America, supra*. Indeed, we have recently denied standing to one suing on the basis of a contract with a co-conspirator. *Fields Productions, Inc.* v. *United Artists Corp., supra*. In determining whether a plaintiff has standing under §4 of the Clayton Act, the only relevant factor is whether the plaintiff is a "target" of the illegal activity. If the plaintiff is not within the "target area," then it is legally immaterial whether the person through whom the plaintiff derives

[3] We do not suggest that a non-operating theater lessor may never have standing to sue for treble damages under §4 of the Clayton Act. If Calderone had alleged, for example, that the defendants had aimed their conspiracy at it, such as by agreeing to distribute and exhibit profitable pictures at theaters owned by the defendants or with which they had flat-lease arrangements, and not to distribute them to theaters with which they had percentage leases, Calderone would be in a different posture.

his injury was a member of the conspiracy or was innocent of any wrongdoing. A plaintiff not a target of any antitrust violation does not become a target by virtue of the culpability of its lessee, patentee, franchisee, supplier, customer, or debtor.[4]

Although Calderone does not have standing under §4 of the Clayton Act, nothing precludes a distributor or exhibitor against whom the alleged conspiracy is directed from bringing a treble damage suit against defendants, and we have been advised that such actions by non-participating exhibitors are now pending in the United States District Court for the Southern District of New York. See, *e.g. Glen Cove Theatre, Inc.* v. *United Artists Corp.*, 66 Civ. 661.

We see no legally significant difference between plaintiff's position and that of the franchisor in *Billy Baxter, Inc.* v. *Coca-Cola Company, supra*, and the motion picture producer in *Fields Productions, Inc.* v. *United Artists Corp., supra*, both of whom were denied standing. Indeed respected courts have held that a non-operating landlord lacks standing to seek treble damages from its tenant and others for alleged antitrust violations which decreased

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[4] The dissent does not feel itself bound by the previous decisions of this Circuit mentioned above, because it views each of these decisions as distinguishable from the present case. We fail to find any legal significance in the factual differences described at some length by Judge Levet. Indeed, even the dissenting judges in two of the cases (*SCM Corp.* and *Billy Baxter, Inc.*) indicated that their disagreements centered upon not whether the precedents were factually distinguishable from the case before them, but whether a different test should be applied.

Nor does the dissent provide any rationale in support of a differentiation based upon whether a plaintiff's relationship was with a victim of the conspiracy or with one *in pari delicto*. Indeed, by denying standing in the latter situation in *Fields Productions, Inc., supra*; we failed to see the relevance of such a distinction. Moreover, we do not agree that Calderone, rather than its lessee-exhibitor, is in an analogous situation to the television stations in *Fields Productions, Inc.*, who were exhibitors of the motion pictures subjected to block booking.

its theatre rentals. See, *e.g.*, *Melrose Realty Co.* v. *Loew's Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956), *motion for leave to file petition for rehearing denied*, 355 U.S. 900 (1957); *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd.*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 (S.D.N.Y. 1961); *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685 (S.D.N.Y. 1963), *aff'd. on other grounds*, 332 F.2d 269 (2d Cir. 1964). We are not persuaded by the contrary decision of the Seventh Circuit in *Congress Building Corp.* v. *Loew's Inc.*, 246 F.2d 587 (7th Cir. 1957), the soundness of which has been questioned by Judge Hastings of that court. See *Sandidge* v. *Rogers*, 256 F.2d 269, 278 (7th Cir. 1958). The Ninth Circuit's decision in *Steiner* v. *20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956), is clearly distinguishable from the present case for the reason that the plaintiff-landlord there alleged that her tenant and various motion picture distributors had conspired to destroy the value of plaintiff's theatre by threatening to withhold first-run motion pictures from it unless plaintiff agreed to reduce the fixed monthly rental and to grant options to renew the lease, which plaintiff was forced to do. Plaintiff there was thus a target of the alleged conspiracy.[5] No such allegation is made in the present case.

Our decision does not leave the plaintiff here without a remedy. Assuming plaintiff's claims to be meritorious, it is not precluded from recovering single damages from UATC in a state court suit for breach of the terms of the

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[5] In addition, the test employed here is consistent with that of later Ninth Circuit decisions. In *Hoopes* v. *Union Oil Co. of California*, 374 F.2d 480, 485 (9th Cir. 1967), and *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073, 1076 (9th Cir. 1970), the court found the plaintiff to be within the "target area" of the antitrust violation.

lease, which forms the basis of the three pendent claims asserted in the present action. Since the federally-based claims were properly dismissed prior to trial, however, the pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966); *O'Neill* v. *Maytag*, 339 F.2d 764, 766 n.3 (2d Cir. 1964).

LEVET, District Judge (dissenting):

I dissent and vote to reverse the determination of the District Court.

The issue presented in this appeal is whether appellant, Calderone Enterprises Corporation (hereinafter "Calderone"), an owner-lessor of motion picture theatres under a percentage lease agreement, has standing to sue its lessee, defendant, United Artists Theatre Circuit, Inc. (hereinafter "UATC"), and other alleged co-conspirators for antitrust violations under Section 4 of the Clayton Act, 15 U.S.C. §15, which resulted in substantial financial damage to the appellant in terms of: (a) reduction in the amount of percentage rental received by appellant from its lessee; and (b) damage to appellant's reversionary and fee interest in the form of a present decline in the market value of the theatre.

In the majority opinion it is asserted that this question has been answered in the negative by the Second Circuit. I am forced to disagree with that conclusion. The issue has never been determined by this Court and the appellant does have standing to sue in this action.

I accept the facts in this case as recited in the majority opinion. In any event, since this action was appealed as a result of the granting of defendants' motion to dismiss for failure to state a claim upon which relief could be

granted, pursuant to Rule 12(b)(6) Fed. R. Civ. P.; I must assume that all the facts in the complaint are correct.

1. *Standing to Sue*

Section 4 of the Clayton Act, 15 U.S.C. §15, provides in pertinent part:

> "That any person who shall be *injured* in his *business or property by reason of* anything forbidden in the antitrust laws may sue therefor . . . and shall recover three-fold of the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added.)

Any natural or artificial person, *i.e.*, corporation, organization or association, can bring an action under this section. However, there are three prerequisites for recovery. First, there must be in fact an injury. Plaintiff must plead with specificity the nature, character, and extent of his injury. Second, the injury complained of must be against plaintiff's business or property. Third, the injury must be proximately caused by the alleged violation, *i.e.*, the plaintiff must show some causal connection between his injury and the illegal acts of the defendant.

Under this statutory scheme Calderone has standing to sue. Plaintiff has alleged an injury to his business and property resulting from an antitrust violation. However, judicial interpretation and application of the statute has imposed an additional requirement. It is no longer sufficient that a plaintiff establish merely that he was "injured" in his "business and property" "by reason of" an antitrust violation. Now, in order to satisfy the statute, a plaintiff must demonstrate that his loss was a result of a direct injury to him by the defendant or that he was within the "target area" of the violation.

This whole notion of directness was first enunciated in the 1910 case of *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704 (3rd Cir. 1910). In *Loeb* plaintiff, a shareholder and creditor of the corporation, which was forced out of business by defendant's antitrust violations, brought an action under Section 7 of the Sherman Anti-Trust Act of 1890. The court reasoned that the injury complained of was directed at the corporation and not at the individual stockholders. The only relief, therefore, the plaintiff could obtain would be through a derivative suit in the name of the corporation. However, the individual stockholder in that case was bringing an action in his own right. Hence, the court termed the injury to the stockholder as "indirect," "remote," and "consequential" and denied the plaintiff standing to sue.

The underlying reasoning of the court in the *Loeb* case seemed to be the fear of possible multipiliety of actions brought by plaintiff-creditors of the corporation if it were to permit the plaintiff in this situation to maintan an acton. The court said:

> "There must exist some barrier which will effectually prevent such a multiplicity of suits as the plaintiff's position suggests, and we believe not only that that barrier exists, but that it is found now just where it was prior to the passage of the Act in question." *Loeb* v. *Eastman Kodak Co.*, *supra*, at 709.

The type of "privity" approach which the courts have attempted to create with the directness requirement in the corporate cases, such as in *Loeb*, has been extended into other areas and a number of Second Circuit decisions have examined this question. For example, in alleged antitrust violations where the plaintiff suffers losses and injuries resulting from a diminution of profitable relations, some courts still hold that the plaintiff has no cause of action.

Fields Productions, Inc. v. *United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971). Also, the courts have generally denied a patentee and a franchisee standing to sue for alleged loss of profits or royalties as a result of injury caused to its licensee by dealings entered into by a competitor. *S.C.M. Corp.* v. *Radio Corp. of America*, 407 F. 2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943; *rehearing denied*, 396 U.S. 869 (1969); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Billy Baxter, Inc.* v. *Coca-Cola Company*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, *rehearing denied*, 401 U.S. 1014 (1971).

Another area that this "privity" doctrine has invaded is in the landlord-tenant situation. However, here the courts have made a clear distinction between lessees who participated in the illegal activities and those who were merely innocent victims. *See* Note, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 583 (1964). In *Congress Building Corp.* v. *Loew's, Inc.*, 246 F. 2d 587 (7th Cir. 1957), the court said that the plaintiff, a nonoperating owner-lessor, whose lease of motion picture theatre property entitled it to a fixed minimum rental plus a percentage of the lessee's gross receipts, could maintain a private antitrust suit to recover treble damages for injuries alleged to have been sustained as a result of a conspiracy by lessees with certain motion picture distributors and affiliated exhibitors to relegate its theatre to an inferior exhibiting position. Plaintiff thus was deprived of rentals under the percentage clause that it otherwise would have received. The court ruled that the injury was direct because the lessee had actively participated in the illegal conspiracy. In this case the Seventh Circuit demonstrated an appropriate flexibility in the application of the standing requirements of the antitrust laws. *See* Note, The Franchisor as Plaintiff in Treble Damage

Actions: An Antitrust Anomaly, 49 B.U.L. Rev. 322, 327-329 (1969).

The rationale in the *Congress Building Corp.* case was specifically adopted in *Erone Corp. v. Skouras Theatres Corp.*, 166 F. Supp. 621 (S.D.N.Y. 1957). There the court held that the plaintiff had standing to maintain a suit against the lessees of the theatres who were participants in the illegal conspiracy to violate the antitrust laws, but against the lessees who were merely victims, there was no cause of action. Furthermore, in an earlier Southern District of New York case, *Camrel Co., Inc. v. Paramount Film Distributing Corp., et al.*, CCH Trade Cas. ¶57, 233 (S.D. N.Y. 1944), the court in a very similar factual situation proposed the exact rationale that the *Congress* and *Erone* cases followed.

The rationale developed in *Congress* is clearly applicable here. In this case we have a nonoperating owner-lessor who has suffered substantial direct injury by the participation of his lessee and other distributors in antitrust violations. Under the *Congress* formula, plaintiff Calderone has standing to sue.

The directness doctrine has not been universally adopted by the courts and another or alternative judicial requirement, the "target area" test, has evolved. This approach focuses on whether the person injured by the antitrust violation was aimed at and hit by the illegal activity. In other words, under this test the plaintiff must demonstrate that he was within the area of the economy endangered by the competitive breakdown. This approach was first proposed in *Conference of Studio Unions v. Loew's, Inc.*, 193 F. 2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). The court said:

> ". . . [i]n order to state a cause of action under the antitrust laws a plaintiff must show . . . that he is

within that area of the economy which is endangered by a breakdown of the competitive conditions in a particular industry." *Conference of Studio Unions* v. *Loew's, Inc.*, *supra*, at 54-55.

The "target area" test was more clearly articulated in *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955). In *Karseal* the defendant, a distributor of car wax, had entered illegal exclusive-dealing contracts with service station retailers, causing them to cease purchasing from plaintiff's distributors the brand of car wax manufactured by plaintiff. The court held that the manufacturer had standing to sue the defendant distibutor, even though the distributor and the manufacturer were from different classes of competitors (*i.e.*, they did not compete at the same market level) and even though the manufacturer's own distributors were the immediate parties injured. Since the defendant's violation was aimed at impeding the sale of competitive products and was directed against the manufacturers and distributors of such products, the court concluded that the competing manufacturers, distributors and producers all were the target of the illegal practices. *See, e.g., Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F. 2d 679 (8th Cir. 1966); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F. 2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

Recently, some courts, especially in the Ninth Circuit, have developed a more flexible definition of the term "target area" and have directed the test towards a question of foreseeability, *i.e.*, whether plaintiff would be in the reasonably foreseeable area to be affected by the antitrust violations. Initially articulated in *Twentieth Century-Fox Film Corp.* v. *Goldwyn*, 382 F. 2d 190, 220 (9th Cir. 1964), the Ninth Circuit applied this test in *Hoopes* v. *Union Oil Company of California*, 374 F. 2d 480 (9th Cir. 1967). In

Hoopes the court held that an owner of a service station had standing to attack illegal restraints upon his conditional vendee, successive lessees, and potential lessees. The defendant's allegedly illegal conduct was "aimed" at restricting the use of appellants' property. "Appellants and their property were within the 'target area' of that conduct —'the area which it could reasonably be foreseen would be affected' by the antitrust violations." *Id.* at 485. The foreseeability test appeared to the court to be more consistent with the purposes of the statute. *See generally* Alioto and Donnici, Standing Requirements for Antitrust Plaintiffs in Judicially Created Exceptions to a Clear Statutory Policy, 4 U. S. Fran. L. Rev. 205, 212-214 (1970).

The latest determination by the Ninth Circuit on this subject squarely affirmed the *Hoopes* articulation of the foreseeability test. In *Mulvey* v. *Samuel Goldwyn Productions*, 433 F. 2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), the court held that the plaintiff had standing to sue where the defendant distributor block-booked plaintiff's films thereby causing him to earn less profit on his percentage-of-net-receipts arrangement with the defendant. The court accepted the findings of the district court that Mulvey was neither a supplier of motion pictures to television nor a customer in the market for such pictures, that defendant Goldwyn's acts of licensing were aimed at television stations and therefore Mulvey was not within the area of the economy endangered by a breakdown of competitive conditions. However, the court, despite the lower court's findings, unequivocally applied the *Hoopes* test and found that Mulvey, the plaintiff, was a reasonably foreseeable victim of such illegal activities and, thus, must be afforded standing to sue. The court said:

> "But Mulvey was 'hit' as squarely as were *Karseal* and *Hoopes*: He was neither sideswiped nor struck by a

'carom shot. He was within the area 'which it could reasonably be foreseen would be affected' by block booking." *Mulvey* v. *Samuel Goldwyn Productions*, *supra*, at 1076. (Emphasis added.)

Calderone should be allowed to recover under the "target area" test. In this present action defendant UATC participated in a system ("Showcase system") of distribution and exhibition of motion pictures that deprived appellant's theatres and all high quality theatres of bidding for better films, thus, reducing substantially the amount of profit of the better theatres. Under the test formulated by *Conference of Studio Unions* and *Karseal* and expanded in *Hoopes* and *Mulvey*, the area of the economy which was being endangered by the breakdown of competitive conditions was the position of all those who stood to gain financially from the showing of better films in these theatres. Calderone was substantially hit by defendant's illegal conduct and it was reasonably foreseeable that Calderone would be affected by such antitrust violations.

In testing Calderone's standing to sue, we must also consider the more basic questions of the purpose of Section 4 of the Clayton Act and consequently the reasonableness of the judicial requirements of directness and the "target area" test.

The purposes of Section 4 of the Clayton Act are not only to enforce the antitrust laws, but also to deter antitrust violations by reason of possible private treble damage suits and to protect and compensate those who are injured by such misconduct, as was Calderone here. *See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 336, 340 (1971); *Fortner Enterprises, Inc.* v.

United States Steel Corp., 394 U.S. 495, 502 (1969); *Perma Life Mufflers v. International Parts*, 392 U.S. 134, 139 (1968); *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1946).

Restrictions on application of the treble damage remedy seem clearly repugnant to the language of the statute and to the repeated pronouncements of the United States Supreme Court. The Supreme Court has constantly recognized that antitrust laws should be given the broadest and most liberal interpretation in order to effectuate Congressional intent. *See, e.g., Radiant Burners v. Peoples Gas & Light Co.*, 364 U.S. 656, 660 (1961); *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957); *Mandeville Island Farms, Inc. v. American Crystal Sugar*, 334 U.S. 219, 236 (1948); *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 265-266 (1946). The Court has consistently rejected judicial attempts to impose additional restrictions on standing under antitrust statutes. In *Radovich, supra*, the court said:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition of unreasonable restraints of trade' . . . 'and meet the requirement that petitioner has suffered injury.' Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the Antitrust laws to an aggrieved party. These laws protect the victims of the forbidden practice as well as the public. . . . *In the face of such a policy, this Court should not add requirements to burden the private*

> *litigant beyond what is specifically set forth by Congress in the laws.*" *Radovich v. National Football League, supra*, at 453-454.

The Supreme Court has never accepted the "target area," "indirect injury" or "proximate cause" limitations on plaintiffs' right to claim relief under antitrust violations. *See* Alioto and Donnici, Standing Requirements for Antitrust Plaintiffs in Judicially Created Exceptions to a Clear Statutory Policy, 4 U. S. Fran. L. Rev. 205, 211 (1970). The editors of the Columbia Law Review have expressed a similar view in regard to the purposes of Section 4:

> "Its purpose is so broad and its mandate so clear that any person who can show damage prima facie should be within the protected class. . . . In view of the section's broad language and purpose, the presumption should be in favor of the plaintiff's right of action, absent a showing that to allow his claim would be contrary to congressional intent." 64 Colum. L. Rev. 570, 587 (1964).

Unfortunately, lower federal courts have demonstrated at times a tendency to be more concerned with the possibility of a windfall recovery under the treble damage provision than with Congress' established intention to *encourage* private treble damage suits as an *enforcement* of the antitrust laws. Courts must consider first the basic purpose of the statute and the uninterrupted line of Supreme Court decisions upholding that position. If lines of demarcation, limitations or restrictions are to be drawn and imposed on the statute, that is for the legislative branch to do and not for this court.

Therefore, the imposition of restrictive judicial requirements on the statute is questionable. First, the soundness

of the directness doctrine is dubious. Formulated in the early part of the nineteenth century when the concept of privity dominated almost any kind of recovery, the reasonableness of this judicially constituted requirement coupled with the purpose of Section 4 of the Clayton Act should be reexamined. Judge Waterman in *Billy Baxter, Inc.* v. *Coca-Cola Company, supra*, vigorously dissented and challenged the directness requirement. His arguments are persuasive and I will further elaborate on them.

It seems anomalous that when a plaintiff suffers injury from defendant's illegal antitrust activity, even though the plaintiff is not in privity with and separated from the defendant by means of an intermediary who is a victim or participant in the misconduct, that the plaintiff may be foreclosed from recovery because his injury is labeled "indirect," "remote," or "consequential." By classifying the injury as such, the plaintiff is precluded from recovery regardless of the extent or nature of the plaintiff's loss. Thus, some courts have taken the approach that when the business and property interests of such plaintiffs are injured because of injuries to the competitive market of persons with whom they are connected, then the plaintiff's position to the defendants is labeled "indirect." Responding to that position of certain courts, Judge Waterman said:

> "... [i]n deciding whether a plaintiff has standing to pursue the federally created cause of action codified in 15 U. S. C. §15 it seems to me that perhaps the use by courts in antitrust opinions of inherited decisional labels may have obfuscated the positions of some plaintiffs so as to have denied them the recoveries which fact-analysis might have indicated they should have obtained." *Billy Baxter, Inc.* v. *Coca-Cola Company, supra*, at 191.

Second, the "target area" test is a conceptual limitation, and at times vague, confusing and inconsistently applied. For example, in *Nationwide Auto Appraiser Service v. Association of Casualty & Surety Co.*, 382 F. 2d 925 (10th Cir. 1967), the court refused to apply the "target area" test on the ground that the "target area" was in fact the same as the direct-indirect test but just given a different name. The court said, "we need not seek new language to express the same doctrine." *Id.* at 928.

The "target area" test seems no more capable than the directness doctrine of vindicating public policy. It still operates to prohibit plaintiffs from suing by applying labels, rather than trying to examine the economic relationships of prospective plaintiffs to the antitrust violations. Although the "target area" approach attempted to remedy the defects of the directness doctrine that Judge Waterman mentioned, it is a far cry from the panacea envisioned. By narrowly construing the so-called "target area," as some courts have done, without taking into account the basic policy considerations, continued denigration is done to the statute. For instance, when there is a knowing and wilful antitrust violation directed against a competitive market with entirely foreseeable consequences to a business dealing within the market, the injured party should be afforded standing to sue. *See* Comment, Franchisor Standing to Sue in Treble Damage Actions, 119 U. Pa. L. Rev. 696, 702-703 (1971). In other words, the "target area" should encompass the foreseeable totality of competitive injury and not, as some courts have interpreted, simply one level of distribution of the product where the injury occurred. When a plaintiff chooses to receve from its licensee, distributor or lessee a percentage-of-gross-receipts arrangement, rather than a fixed sum, it has become in-

timately interwoven into the competiitve market and no longer a bystander. Here, the plaintiff deserves compensation whenever the violator illegally forces the market to reduce its profit, no matter at which stage or level in the marketing process the violation occurs. *See* Note, 45 Tul. L. Rev. 1031, 1035-1037 (1971).

Antitrust regulations are not always paragons of clarity and both judicial requirements of directness and the "target area" test have frequently been imprecisely defined and applied. Therefore, in any violation under Section 4 of the Clayton Act, one must look mainly at the underlying policy considerations and at the particular facts and circumstances of the case. And if the district and circuit courts persist in employing labels like the directness and "target area" tests, then these requirements should be applied broadly and liberally, as in *Mulvey*, in order to fulfill the fundamental purpose of the antitrust laws. *See, e.g.*, 40 U. Cin. L. Rev. 129, 133-135 (1971); 19 Case W. Res. L. Rev. 132, 137-138 (1967).

II. *Second Circuit Decisions*

The majority opinion contends that prior decisions in the Second Circuit support the lower court ruling here that appellant has failed to state a claim for relief under the antitrust laws and it is incumbent on this court to follow that precedent. I disagree.

The issue now presented is essentially different from previous determinations in this circuit. Here, the appellant, an owner-lessor of motion picture theatres under a percentage lease agreement alleges that its lessee and other individuals conspired to violate the antitrust laws causing substantial financial damage to the appellant. The cases

cited that supposedly preclude recovery are the following: *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *S.C.M. Corp. v. Radio Corporation of America*, 407 F. 2d 166 (2d Cir.), *cert. denied*, 395 U.S. 945, *rehearing denied*, 396 U.S. 869 (1969); *Billy Baxter, Inc. v. Coca-Cola Company*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, *rehearing denied*, 401 U.S. 1014 (1971); *Fields Productions, Inc. v. United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *affirming*, 318 F. Supp. 87 (S.D.N.Y. 1969), *cert. denied*, 401 U.S. 949 (1971); *Lieberthal v. North Country Lanes, Inc.*, 221 F. Supp. 685 (S.D.N.Y. 1963), *aff'd on other grounds*, 332 F. 2d 269 (2d Cir. 1964). I will analyze each of these cases to demonstrate that they are not controlling here and that they have not considered this particular question.

In *Productive Inventions v. Trico Products Corp., supra*, the owner of a patent brought an action against its licensees-competitors, causing harm to said licensees, and, in turn, damaging plaintiff because of reduced royalties. The court concluded that the wrongful acts were not directed against plaintiff-licensor but against its licensees and, hence, that plaintiff lacked standing to sue. This case is unlike ours in that there defendant-licensee was an innocent party and not a participant in the antitrust violations. Moreover, the court limited that decision to the facts of the case by saying:

> "No hard and fast rule can be laid down in these situations as the line between direct and incidental damage is not always definable with clarity. All we here determine is that under the facts pleaded appellant has no right to recover treble damages." *Productive Inventions v. Trico Products Corp., supra*, at 680.

Furthermore, the *Productive Inventions* case, in seeming to restrict the concept of treble damages, is in apparent conflict with the purpose of the statute and the Supreme Court pronouncements, besides being the subject of much criticism. *See, e.g.*, 69 Harv. L Rev. 575, 576 (1956); *S.C.M. Corp.* v. *Radio Corporation of America*, 407 F. 2d 166, 172-173 (1969) (Judge Timbers dissenting).

S.C.M. Corp. v. *Radio Corporation of America*, *supra*, like *Productive Inventions*, involved an owner of a patent bringing an action against competitors of its licensees for antitrust violations. In *S.C.M.* RCA alleged a counterclaim based on allegations that S.C.M. sold Electrofax machines on the unlawful condition that purchasers would not buy or use goods of an S.C.M. competitor in violation of the Clayton Act. RCA also claimed that S.C.M. lured and induced breach of contract by the personnel of its prospective competitors and licensees, and complained of diminished royalties which resulted in injury. Judge McLean, in the court below, decided that there was no direct injury to RCA because the injuries suffered were by 63 licensees and, hence, RCA had no standing to sue.

Judge Moore in the Court of Appeals seems to have agreed with Judge McLean that RCA's injuries in loss of royalties and litigation expenses were not sustained by reason of the plaintiff's antitrust violations but because of plaintiff's challenges to RCA patents.

Judge Moore commented, however, that RCA was not foreclosed from seeking treble damages or injunctive relief if it could plead and establish by proof the causation required by the statute. As he said:

> "RCA is not foreclosed from seeking treble damages or injunctive relief if it can plead, and establish by

> proof, that causation required by the statute. All that the district court decided was that 'the second counterclaim does not allege facts which confer upon defendant standing to sue for plaintiffs' alleged violations of the Sherman Act and the Clayton Act.' This is all that we affirm." *S.C.M. Corp.* v. *Radio Corporation of America*, *supra*, at 171.

All the *S.C.M.* case held was that there was no causal connection between the violations and plaintiff's injuries and that the real injury occurred to the licensees. Furthermore, in *S.C.M.*, Circuit Judge Timbers, then a district judge, dissented and strongly questioned the precedent in *Productive Inventions*. Judge Timbers concluded that where the defendant had acted to deter competition and, as a result, the plaintiff suffered substantial injury, standing to sue should be granted.

Billy Baxter, Inc. v. *Coca-Cola Company*, *supra*, involved basically a similar relationship. Here, the plaintiff-franchisor asserting the rights of its franchisees brought a treble damage antitrust action against defendant manufacturers of nonalcoholic carbonated beverages for alleged use of improper methods to persuade retail outlets to buy products other than those it manufactured. In *Billy Baxter* the franchisees were innocent third parties and mere victims of the illegal activity. In addition, none of the producers who were affected by the persuasion were customers of Baxter, Inc. It is difficult to see how this case applies to our situation.

In *Fields Production, Inc.* v. *United Artists Corporation*, *supra*, the plaintiff, a motion picture producer, alleged that defendant, in block booking plaintiff's picture, allocated a sum of money to such picture which was less than fair

value of the television rights in such picture. The district court held that plaintiff did not have standing to sue and maintain a private treble damage antitrust action. The district court, however, did say that it was "the television stations and the other distributors who . . . [were] in the 'target area.'" *Id.* at 88. Under this rationale, Calderone's three theatres would be in an analogous situation to the television stations (an exhibitor of the motion pictures) and here would fall within the so-called "target area." Therefore, Calderone, the owner of these three theatres is directly affected by the loss of revenue of these theatres, and it was reasonably foreseeable that Calderone would be so affected. Moreover, in *Fields*, the Court held that the damages asked for were unrelated to the alleged antitrust violations and thus held that there was no standing to sue.

Finally, in *Lieberthal* v. *North Country Lanes, Inc.*, *supra*, a case not discussed by the majority opinion, the amended complaint was dismissed in the district court on account of lack of jurisdiction because bowling does not involve interstate commerce. *Id.* at 688. The fact that Judge Wyatt went further and intimated that the plaintiff has no standing to sue is purely *obiter dictum*. The Court of Appeals seems to have affirmed the district court decision on the ground "that the complaint does not establish a Sherman Anti-Trust violation based on acts occurring in interstate commerce" and expressed no opinion as to the question of standing to sue. *Id.* at 272, 270.

It is obvious from the examination of these Second Circuit cases that none are on point. They have denied standing to sue in situations either where licensees are innocent victims or where a causal connection has not been established between the violation and the injury. These cases

have involved neither landlord-tenant relationships (except for *Liebèrthal*) nor cases where the lessee was an active participant in the conspiracy. In addition, a number of the cases have been sharply restricted to their particular facts.

Admittedly, the "target area" test applied by the Second Circuit has been more restrictive than in other circuits. However, here, the factual circumstances present a different situation unlike the ones presented in the previous cases discussed. The "target area" test applied to this particular set of facts should follow the Ninth Circuit's approach conceived in *Conference of Studio Unions* and *Karseal* and expanded in *Hoopes* and *Mulvey*. The test should consider not merely at whom the violations were aimed but rather at whom the violations were reasonably foreseen to affect.

III. *Other Circuit Decisions*

Since the Second Circuit cases are not conclusive, I believe that the rationale in the Seventh and Ninth Circuits is validly applicable in this situation while the approach in the Third Circuit is not. *See Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956); *Congress Building Corp.* v. *Loew's, Inc.*, 246 F. 2d 587 (7th Cir. 1957); *Melrose Realty Co., Inc.* v. *Loew's, Inc.*, 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956), *motion for leave to file petition for rehearing denied*, 355 U.S. 900 (1957); *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D.Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

Steiner v. *20th Century-Fox Film Corp.* (1956), *supra*, a Ninth Circuit decision, involved a similar situation. In

that case, the appellant, an owner of a motion picture theatre, leased the said theatre to individuals who conspired with defendants to monopolize first-run pictures, thereby forcing appellant to receive less than the reasonable rental value of the theatre and to do acts detrimental to the appellant's reversionary interest. The court clearly held that appellant-landlord had standing to sue under the antitrust laws.

The appellees in defense asserted that as a matter of law the appellant's interest as a landlord was too remote to permit recovery and cited the Third Circuit decision of *Harrison* v. *Paramount Pictures*, *supra*, as their authority. The court in *Steiner* distinguished the *Harrison* case and said that in *Harrison* there were no direct dealings between the plaintiff and the defendant. *Steiner*, *supra*, at 193. In *Steiner* the appellees conspired with the prime lessee to force the appellant to receive less than the reasonable rent. Appellant was not seeking simply damages caused to another, the lessee, but was claiming direct injury to itself.

The majority opinion in our present case suggests that the *Steiner* decision is "clearly distinguishable" from Calderone's situation because the plaintiff in *Steiner* was the "target" of the alleged conspiracy. This, I cannot agree with. The cases are similar. Here, Calderone is alleging that its lessee, UATC, conspired with others to cause it direct injury and that it was a reasonably foreseeable victim of such illegal activity. Under the *Steiner* formula, Calderone must have standing to sue. The Seventh Circuit a year later followed this approach in *Congress Building Corp.*, *supra*, which I discussed earlier, and clearly affirmed the reasoning of the Ninth Circuit's rationale.

The majority opinion, nonetheless, mentions two decisions in the Third Circuit challenging the *Steiner* and *Congress* approach affording plaintiff's standing to sue. These decisions in the Third Circuit, however, are not clear as to their meaning and effect. In *Harrison* v. *Paramount Pictures, Inc.* (1944), *supra*, the court refused plaintiff-landlord standing to sue on the grounds that the nature of the property involved did not fit within the statutory scheme and that the injury was too remote. Besides these differences in factual findings between Harrison and our present case, the court also limited the import of its holding to the specific facts of that case. The court said:

> "It is not possible to formulate any general rule by which to determine what injuries are too remote to bring a plaintiff within the scope of the Act and I shall not attempt to do so. Each case must be dealt with on its own facts. All that is decided here is that this plaintiff's loss, if any, is beyond the limit of injuries cognizable under the antitrust laws." *Harrison v. Paramount Pictures, Inc.*, *supra*, at 317.

In *Melrose Realty Co.* v. *Loew's, Inc.* (1956), *supra*, the court of appeals of the Third Circuit in a short *per curiam* opinion affirmed the lower court decision solely on the authority of the *Harrison* case. The court of appeals seems to have failed to heed the impact of the *Harrison* case which irrevocably stated that each case must be considered on its particular facts. On petition for rehearing, though, the appellants reiterated that the *Harrison* case was distinguishable and not controlling, the court still denied the petition, although Chief Judge Biggs dissented. The Chief Judge decried the *Harrison* rule and affirmed

the Ninth Circuit approach in *Steiner* giving plaintiff standing to sue. Chief Judge Biggs said:

> "The lessor suffers property damage because of the illegal act of the lessee arising out of the conspiracy and that injury is direct and not remote. The lessor should receive the protection of the Clayton Act. See Steiner v. 20th Century-Fox Film Corp. . . ." *Melrose Realty Co. v. Loew's Inc., supra*, at 519-520.

The judicial reasoning by the Seventh and Ninth Circuits presents a logical and just approach to the situation while balancing the basic policy considerations of the antitrust laws. The Third Circuit rationale of *Harrison* has been severely questioned and is not applicable here.

IV. *Other Arguments*

There are a number of other arguments stated by the majority for denying plaintiff standing to sue. I will briefly comment on them.

Although antitrust laws, as the majority points out, are not always meticulously defined and crystally clear and damages may be more speculative and difficult to prove as a result of the treble damage action, I know of no authority that compels this court to deny plaintiff standing to sue on these grounds. Difficulty or uncertainty in determining damages has never been a bar to suit. The Supreme Court confirmed this view in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931), a case involving a violation of the Sherman Anti-Trust Act. The Supreme Court said:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages

with certainty, it would be a perversion of fundamental principles of justice to deny relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co. v. Patterson Paper Co.*, *supra*, at 563.

See also Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251, 264-265, *rehearing denied*, 327 U.S. 817 (1946); *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359, 379 (1927); *Hays v. United Fireworks Mfg. Co.*, 420 F. 2d 836, 845 (9th Cir. 1969); *Riverside Coal Co., Inc. v. United Mine Workers of America*, 410 F. 2d 267, 274 (6th Cir.), *cert. denied*, 396 U.S. 846 (1969); *Eutis v. Atlantic Wire & Cable Corp.*, 335 F. 2d 759, 763-764 (2d Cir. 1964); *National Wrestling Alliance v. Myers*, 325 F. 2d 768, 777 (8th Cir. 1963); *William H. Rankin Co. v. Associated Bill Posters of U.S. and Canada*, 42 F. 2d 152, 155 (2d Cir.), *cert. denied*, 282 U.S. 864 (1930).

The majority opinion also expresses the fear of windfall recoveries and the opening of the "flood-gates" to all that are lured by possible treble damage relief, which would result in an "over-kill" enlarging the "private weapon to a caliber far exceeding that contemplated by Congress." Therefore, the majority suggests that we apply a "rule of reason" creating an "easily identifiable cut-off" to save the economy and the courts from a deluge of opportunistic suitors—a veritable Noah's Ark. I cannot agree. The language of the statute itself and the Supreme Court decisions considering this very question have unequivocally stated that the purpose of Section 4 is to encourage private treble damage suit, to deter antitrust violations, and to compensate those for injuries sustained. If Congress did not realize what it created, then it is for Congress, not

the courts, to limit. Furthermore, even though the Supreme Court has denied certiorari in a number of Second Circuit cases that applied a restrictive "target area" test, this does not mean that the highest court has given affirmance to judicial legislation. The denials of certiorari in all the Second Circuit cases were based on different factual backgrounds. The decisions of the Supreme Court still hold that private treble damage actions should be given their broadest and a most liberal interpretation. Those holdings are the best indication of the Supreme Court's position.

V. *Conclusion*

The majority presents no convincing arguments to justify precluding appellant Calderone from suing under Section 4 of the Clayton Act. Calderone's claim to relief is consistent with the basic purpose of the statute and with the interpretation of the Supreme Court. It would fit under the directness doctrine or under the "target area" test as formulated by the Ninth Circuit. The Second Circuit cases involving the restrictive "target area" test have not encountered the essential facts or issues presented here and, thus, are not conclusive on this court. Neither is the case law precedent of the Third Circuit applicable in this case. The Seventh and Ninth Circuits put forth a far more feasible and flexible approach taking into account the fundamental policy considerations of the statute under which Calderone can sue.

Therefore, I have no alternative but to dissent and vote to reverse.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of December one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN
HON. WALTER R. MANSFIELD
Circuit Judges
HON. RICHARD H. LEVET
District Judge

CALDERONE ENTERPRISES CORPORATION,
Plaintiff-Appellant,

v.

UNITED ARTISTS THEATRE CIRCUIT, INC., METROPOLITAN PLAYHOUSES, INC., UNITED ARTISTS EASTERN THEATRES, INC., TWENTIETH CENTURY-FOX FILM CORP., NATIONAL GENERAL PICTURES CORP., COLUMBIA PICTURES INDUSTRIES, INC., PARAMOUNT PICTURES CORP., METRO-GOLDWYN-MAYER, INC., UNITED ARTISTS CORPORATION and WARNER BROS-SEVEN ARTS, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARI
Clerk